Case and Comment.

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS.
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CASE AND COMMENT.

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Executing Unpopular Laws.

The sudden and absorbing interest focused from all parts of the country on the police commissioners of New York city merely because of an honest effort to do their official duty is peculiarly suggestive. It is an interesting condition of things when simple fidelity to duty on the part of local officers makes a national sensation. The most evident inference is that enforcement of criminal law is not an American habit. This inference becomes a demonstrated fact when we find the percentage of cases in which crime is punished. A general degeneracy of official service is largely responsible for this; but we may well ask whether there is not something in the laws themselves to be remedied. Any laws that are not just and wise we should get rid of. To enforce laws will go far to demonstrate whether they are good or not. It will at least bring out the objections to them. But the pernicious system in which executive officers assume a discretion as to enforcing the various laws which they have sworn to execute is utterly evil. Under it official blackmail, bribery, and extortion naturally develop. Those who disapprove a law may find it hard to praise an officer for executing it; but to attack him for doing so is to attack official integrity. Police officials or other executive officers who assume a discretion as to executing a law, usurp a function which the highest court cannot exercise and deserve impeachment and disgrace. All honor is due to an officer who regards his official oath and dares to do his duty without regard to its effect on his popularity.

Private Prosecution of Criminals.

No one will contend that the prosecution of criminals should be left to private individuals, or deny that it is a public function. Yet many crimes go unpunished merely because no private person pushes the prosecution. It is often the case that officers pay no heed to crimes, even when matters of notoriety, unless some private citizen assumes the burden and responsibility as if it were his individual business. This is especially true when the crime is one that has particularly injured the person or property of one or more individuals. If the especially injured persons do not actively push the prosecution, nothing is done. This has come to be well understood and so much a matter of course that a newspaper reporting a crime frequently states, as a fact, that it will not be prosecuted. When the crime is one of violence or when public interest is greatly aroused and the capture of the criminal will win laurels for the officer no outside pressure is necessary. In most other cases it is necessary. Illustrations are abundant and within the observation of every one. For instance, several notorious cases of bigamy of more than ordinary indecency existing at the same time in a small town where everybody knows the facts have been entirely ignored by the officials. If they had been murders the officers would not have needed one-hundredth part of the information they possess in order to ensure their action. The purchase of votes has often been carried on almost openly without the slightest attention from public officers. In one instance where it was town, and even county, talk, that money was shaken before the eyes of voters in the streets of a village in

bidding for votes with as much openness as if the bid was at a public auction, no step was ever taken toward prosecution or investigation. For most minor offenses, and for many which are very grave, a prosecution without a private citizen pushing it on is an exception. This leaves private interests and private spite to execute the criminal law. It leaves many crimes to go unpunished and tends to breed disrespect for the law.

The matter is not without difficulties. Executive officers cannot be expected to squander public money for investigating unsubstantial rumors of crime. When officers act with ordinary judgment and prudence they cannot be blamed. But it would surely be a demoralized and vicious system that made public officers the mere agents of private persons in the prosecution of crimes whether high or low. It is a public disgrace when private citizens have to form an association and act at their own expense in order to get crimes of any sort punished. We have had instances of this, and there has often been need of such private organizations to perform such public service. A better sense of official duty would prevent the abandonment of such a purely public function to private persons.

A Baseless Doctrine.

The perpetuity of a mere *dictum* misconceived as authority and erroneous in substance, until it obtains widespread acceptance as well-settled law is a strange thing; yet this has actually happened in respect to the doctrine that a servant or agent cannot be held liable to third persons for his own negligence. Wharton on Agency, § 535, says: "By Anglo-American law a servant who by negligence in the discharge of his duties injures a third person is not personally liable to such third person." Similar statements are found in Story on Agency, § 308; Evans on Agency, 385, and Dunlap's Paley's Agency, 396. It is said in Colvin *v.* Holbrook, 2 N. Y. 129: "It is also settled, if anything can be established by authority, that an agent is not liable to third persons for any omissions or neglect of duty in the matter of his agency, but that the principal is alone responsible." This is a mere statement and not a decision, as the case was one brought against a deputy sheriff for money in his hands. Similar *dicta* are numerous. This array of text-books and judicial *dicta* is not to be lightly contradicted. But that they are all wrong is demonstrated by examination of the actual decisions on the subject.

The peculiar feature of the matter is that this series of *dicta* is a trail of blunders. A mere *dictum* in a dissenting opinion on a different question by Lord Holt in the case of Lane *v.* Cotton, 12 Mod. 488, has been by some strange misconception taken to be an authority on the subject. That case actually decided that a postmaster-general was not liable for the loss of a letter by a clerk in the post-office. Lord Holt dissented but wrote the only opinion found in the case and this has been carelessly taken to be the opinion of the court. The case did not involve the liability of a servant or agent for his own negligence, and Lord Holt was in favor of holding the defendant liable for negligence of a subordinate; and the case was decided on principles applicable to public officers rather than mere agents or servants. Yet Lord Holt said in that case that a servant could not be charged for neglect, and the fact that this at the best was a purely *obiter dictum* and the further fact that his opinion was a dissenting one have been overlooked or ignored and the case cited as an authority for that proposition, while the superfluous *dictum* has become the mother of a brood of later *dicta* to the same effect. It has also caused needless and somewhat fallacious attempts by courts which have held servants liable for negligence to show that their negligence was misfeasance rather than mere non-feasance. How strangely this mere *dictum* of a dissenting judge has been misconceived is shown in Erwin *v.* Davenport, 9 Heisk. 44, where the court says: "It was determined by Lord Holt in Lane *v.* Cotton that for neglect in an agent there is no remedy against him." Undoubtedly the blame of these blunders rests chiefly on the text-books. The court in the case just cited also says in reference to the distinction between non-feasance and misfeasance in such cases, "although it may seem nice and artificial yet it is said by Mr. Story to be well established." Yet Story on Agency, § 308, where the doctrine is laid down that an agent is not generally liable to third persons for mere non-feasance or omissions of duty, cites no cases in support of it except this case of Lane *v.* Cotton and that of Perkins *v.* Smith, Sayer, 40. The latter case like the former decides nothing on this subject, but does decide that a servant is liable in trover and on the question of negligence or non-feasance the opinion goes outside of the case to quote this dissenting *dictum* of Lord Holt. The other text-books above named also base

their text on Lane *v.* Cotton. Wharton cites in addition to that a number of other cases which are equally worthless as authority for his proposition. It should be noticed that Mr. Mechem's admirable work on Agency is not influenced by these *dicta* but presents the matter in the light of the actual decisions.

When we come to the decisions actually rendered by the courts on this subject we find that in almost every case a servant or agent who by negligence in respect to his duty to third persons causes them injury has been held liable to them. Two or three possible exceptions are directly based on the authority of Story and Wharton which as shown above have no real authority to support their text but base it on an *obiter dictum*, even that being taken from a dissenting opinion. While many of the cases have struggled to avoid conflict with the supposed rule of law based on Lord Holt's *dictum* by deciding that the negligence involved was a misfeasance, this is not true of them all. The latest case on the subject, Mayer *v.* Thompson-Hutchinson Building Company (Ala.) 28 L. R. A. ——, repudiates the whole theory of non-liability for misfeasance. It states the only sensible rule on the subject as follows: "The mere relation of agency does not exempt a person from liability for any injury to third persons resulting from his neglect of duty for which he would otherwise be liable. This decision is fully supported by the great majority of cases on the subject which are all reviewed in the annotation which accompanies the case. The simple test of liability in such a case is the neglect of a duty toward the person injured. If such neglect exists there can be no reason for denying liability merely because the negligent person was at the time under contract with some other person as agent or servant even if his negligence was also a breach of a distinct duty to the latter. The whole unreasonable doctrine of non-liability for mere non-feasance in such case seems to have rested on some underlying notion that an agent or servant of another is "his man" in such sense that he can have no duty toward any one else. The distinction is clearly shown by the court in Baird *v.* Shipman, 132 Ill. 16, 27 L. R. A. 128, where it is said: "It is not his contract with the principal which exposes him to or protects him from liability to third persons but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency; nor can its breach be excused by the plea that his principal is chargeable." There can be no doubt about the law of the subject when the decisions are fully compared. The wonder is that a proposition baseless in reason and utterly unsupported by any real authority should have been so generally supposed to be the law.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Books 27, Part 6, and 28, Part 1.

Mentioning only complete notes therein contained without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with Case and Comment for one year for one dollar.

Among the New Decisions.

Municipal Corporations.

The constitutional power of the legislature in respect to making annexations to municipalities is involved in two recent decisions.

The power to annex territory without consent of the constituted authorities or inhabitants is sustained in State, Richards, *v.* Cincinnati, (Ohio) 27 L. R. A. 737, and this case also holds that it is no objection that the property in the annexed territory will be subject to the prior indebtedness of the municipality.

A restriction on the power of the legislature to extend or enlarge city limits is made in Denver *v.* Coulehan (Colo.) 27 L. R. A. 751, where it is held that territory entirely separated from a municipality cannot be annexed to it. In this case an attempt to annex a strip of land entirely cut off by intervening territory which was included in other incorporated towns was held unconstitutional.

The constitutional limitation of the indebtedness of a city is held in Saleno v. Neosho, 27 L. R. A. 769, not to defeat a twenty-year contract for a water supply, as the aggregate payments for the twenty years were not regarded as an indebtedness within such restriction.

The rule that a city must let contracts to the lowest responsible bidder is enforced in Frame v. Felix, 167 Pa. 47, 27 L. R. A. 802, where the contract was let through the agency of a water board which was a department of the city government.

The compulsory purchase by a city of a waterworks plant on the expiration of a franchise is involved in National Waterworks Co. *v.* Kansas City (C. C. App. 8th C.) 27 L. R. A. 827, in which it is held that the waterworks company cannot assert the disability of the city to buy, and the question, what constitutes the fair and equitable value of the property,—is determined.

Conflict of Laws.

An antenuptial contract made in a foreign country is denied force in Long *v.* Hess, 154 Ill. 482, 27 L. R. A. 791, as against the laws of Illinois respecting the disposition of real property in that state, and the contract adopting children is held ineffectual to give them as heirs a right to inherit as against a deed or will by the adopting parent.

Interstate Telegraph.

A message transmitted by a telegraph company between points in the same state which is delivered at an intermediate point in another state to a different company because the line of the former is occupied is held in Leavell *v.* Western Union Telegraph Co. (N. C.) 27 L. R. A. 843, not to constitute interstate commerce.

Taxing Mortgages.

A real estate mortgage owned and controlled by a nonresident of the state is held in Holland *v.* Silver Bow County Comrs. (Mont.), 27 L. R. A. 797, not to constitute property in the state for the purposes of taxation.

Electric Railroads.

An electric railway over country roads between cities and towns is held in Pennsylvania R. Co. *v.* Montgomery County Passenger R. Co. (Pa.) 27 L. R. A. 766, to be an additional servitude entitling the land owner to compensation, but in addition to this the right to build them without the consent of such land owners is denied altogether on the ground that the statutes have not authorized it.

Corporations.

Liability as partners on failure to make a valid incorporation which is attempted in good faith but fails because of some mistake or oversight, is denied in Globe Publishing Co. *v.* State Bank, 41 Neb. 175, 27 L. R. A. 854, and a prior statute creating such liability is regarded as penal the repeal of which destroys an existing liability thereunder.

Insurance.

The mortgagee clause in a New York standard insurance policy is held in Southern Home Building & Loan Asso. *v.* Home Insurance Co. (Ga.) 27 L. R. A. 844, not to dispense with the stipulated proofs of loss within the time prescribed. The mortgagee must furnish them if the mortgagor does not.

Proceeds of insurance on exempt property are held in Puget Sound D. B. & P. Co. *v.* Jeffs (Wash.) 27 L. R. A. 808, to have the same exemption which the property had.

Fraudulent Purchases.

A valuable case on a novel question is that of American Sugar Ref. Co. *v.* Fancher, 145 N. Y. 552, 27 L. R. A. 757, sustaining a suit by the defrauded seller of goods for the proceeds of the goods which the fraudulent purchaser had resold to bona fide purchasers on electing to rescind the original sale for fraud. This right is enforced against an assignee for creditors of the fraudulent purchaser.

Account Stated.

The doctrine of an account stated is denied application to a single item of an unliquidated claim of damages for breach of contract in the case of Vanbebber *v.* Plunkett (Or.) 27 L. R. A. 811.

Conditions against Alienation.

A condition in a devise that the property shall never be subject to any debt, liability, execution, or attachment against the devisee, is held in Van Osdell *v.* Champion (Wis.) 27 L. R. A. 773, to be invalid as against creditors of the devisee.

Husband and Wife.

A fraud on the wife of the purchaser of land was asserted but held not to be made in Walker *v.* Walker (N. H.) 27 L. R. A. 799, by taking a deed of the homestead in the name of the husband as trustee for his sons by a former wife, where the amount of his money invested therein was but a small part of his estate and a reasonable provision for the sons

Innkeeper's Lien.

The lien of an innkeeper for the board and lodging of a commercial traveler upon goods sent him for sale is unheld in Robins & Co. *v.* Gray [1895] 2 Q. B. 78, although at the time of their receipt into the inn such innkeeper knows them to be the goods of the principal, as he is bound to receive and take care of them as a part of his duty toward his guest.

Vicious Animals.

The doctrine of *scienter* in respect to liability for acts of vicious animals is held in Morgan *v.* Hudnell, 52 Ohio St.—, 27 L. R. A. 862, to have no application to injuries by an animal while trespassing, such as the case of a trespassing horse which kills another horse.

Overflow Waters.

The right to erect great railway embankments is held in Kansas City, M. & B. R. Co. *v.* Smith (Miss.) 27 L. R. A. 762, to be necessarily implied in the duty to provide safe roadways, so that for consequential injury by overflow of lands by river water on account of such embankment no liability on the part of the railroad company exists.

Grand Jury.

The legality of a *de facto* grand jury is held in State, Dunn, *v.* Noyes, 87 Wis. 340, 27 L. R. A. 776, to be a matter which cannot be questioned upon habeas corpus proceedings by a prisoner under indictment by such body.

An indictment presented by a grand jury of five persons all of whom concur is held valid in State *v.* Belvel (Iowa) 27 L. R. A. 846, although the statute provides for a grand jury of seven of whom five must concur.

Medical Services.

A corporation voluntarily providing a physician for injured or sick employés who are free to accept or reject his services is held in Pittsburgh, C. C. & St. L. R. Co. *v.* Sullivan (Ind.) 27 L. R. A. 840, to be liable, if at all, only for negligence in selecting the physician and not for his negligent and tortious acts in treating an employé.

Servant's Employment of Substitute.

The liability of the owner of an omnibus for the negligent driving of one authorized by the driver and conductor to drive it home upon the driver's being taken from the omnibus by a policeman under the impression that he was drunk, is denied in Gwilliam *v.* Twist (C. A.) [1895] 2 Q. B. 84, rev'g 1 Q. B. 557, where the omnibus at the time was but a quarter of a mile from the yard of such owner and the latter might have been communicated with so that there was no necessity for his servant's employing another person to drive the omnibus home.

Trade Union.

The district delegate of a trade union is held in Flood *v.* Jackson (C. A.) [1895] 2 Q. B. 21, not to be the agent or servant of the members of the union so as to render each of them liable for his acts in inducing an employer to discharge or refuse to re-engage an employé by threats that other employés will quit work. But the court holds the delegate liable to the rejected employer although he had no contract for employment which was broken.

Composite Photograph.

A composite photograph of several genuine signatures is held in Vanderslice *v.* Snyder (Pa. C. P.) 4 Pa. Dist. R. 424, to be inadmissible for the purpose of comparison with a disputed signature.

The Humorous Side.

NOT DELIVERED IN PARTS.—In an old Tennessee case in which one of the joint owners of a jackass forbade a sale by the sheriff under execution by the other part owner, the court recites that "the sheriff sold and delivered to the purchaser the whole jack."

QUERY AS TO THE PRUDENCE.—In deciding that a father properly used for his children's support their funds held by him as guardian the court in a late case said: "Had the father even now ample estate we might let him pay this money, but he has nothing except a wife and 11 children." Further on it is said: "The father's lot seems to have fallen on hard lines. He is proved to be a sober, industrious and prudent man."

QUERY AS TO THE CAUSE.—A proposition in the index of a well known law reporter is as follows: "Verdict for $5,000 for personal injuries to a farmer 50 years old, with a large family depending on him, which caused his leg to become stiff, and several inches shorter than the other, held not excessive."

THE RIGHT TO HAVE A HUSBAND.—The old fashioned right of a woman to get married is upheld in a recent decision by the New York Court of Appeals. It decides that such a time-honored and somewhat customary exercise of personal rights did not disqualify a woman to continue service as personal attendant upon a very large and therefore somewhat helpless man as well as general housekeeper or manager of his stylish establishment. Her discharge because of her resolve to marry is held to be unjustifiable and a verdict of $8,330 is recovered. To support the claim of a right to discharge her for getting married, counsel cite as a pertinent authority an Alabama decision sustaining the discharge of a servant for getting drunk; but the court seems to have distinguished the cases.

A WIFE'S NECESSARIES.—The bronzing of a wife's hair was held in an English case mentioned in Law Notes for August, 1895, not to be included among the necessaries which her husband must pay for. In this case it seems the husband didn't like the color.

A NEW JOKE BY THE COURT.—In a late Federal court case, the court says: "The time will probably never come when a collision resulting from an attempt to have two trains going at full speed, in opposite directions, pass each other on the same track, will not be held to be negligence in law."

A STAR PERFORMANCE.—From a Wisconsin judge we get the following account of an actual occurrence: "Col. B. of the Wisconsin bar is a rather gruff and tart old fellow who is accustomed to express himself whether in private or before the court in bold and unambiguous language. In a brief, following some temperate criticisms of the rulings of the trial court, appeared about a page of stars. Some of the judges of the Supreme Court were a little curious to know what was meant by this array of stars, and after the argument of the case was finished, one of them approached the Colonel with an inquiry. He answered: 'You have made a —— —— fool rule that if the attorney abuses the trial judge, he cannot tax any costs if he beats the other feller. My client is poor and I didn't want to break the rule, so I put the stars in the brief and leave it for you fellers to imagine what my opinion was of a judge who would make such a —— fool ruling.'"

An Ancient Law Report.

A Greek manuscript report of an Egyptian lawsuit is described by Prof. Mahaffey in a recent article. It was among a bundle of manuscripts in a pot dug up near Thebes. The date is 11 B. C. The complaint was against an alleged nuisance. The plaintiff was a very old soldier stationed at Ombos. He complained of the use of a house and garden by people engaged, not exactly in embalming the dead but in the religious ceremonies connected with that occupation. The defendants answer that they had acquired the property from the co-heirs of the plaintiff and that their trade was not only innocent but honorable. The judges, who are enumerated in the manuscript, draw up a report which Prof. Mahaffey says is as perfect as any printed in the present day, stating the case, giving the arguments of counsel on either side, citing documents in proof of sales, and finally giving their decision against the plaintiff.

Personal.

To the list of judges who have died during this year have recently been added the names of Howell E. Jackson after a little more than two years' service on the bench of the Supreme Court of the United States and of Harlow S. Orton, chief justice of the Supreme Court of Wisconsin, who had been chief justice since Jan. 1, 1894, and a member of that court since 1878.